

# STATE OF ALASKA

## DEPARTMENT OF FISH AND GAME

### OFFICE OF THE COMMISSIONER

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August 25, 2006

Mr. Ron McCoy, Acting Chairman  
Federal Subsistence Board  
Office of Subsistence Management  
US Department of the Interior  
3601 C Street, Suite 1030  
Anchorage, AK 99503

Dear Mr. McCoy:

As provided for in Subpart B, 36 CFR §242.20 and 50 CFR §100.20, of the Subsistence Management Regulations for Public Lands in Alaska, the Alaska Department of Fish and Game hereby requests that the Federal Subsistence Board reconsider its decision of May 16, 2006, on Proposal WP06-01. The Board rejected the proposal to adopt rules relating to commercial sales of claws and other parts of bears taken for subsistence, thereby retaining final rules that allow unconstrained sales of bear parts. The Board also rejected suggestions from the state and others for removal of the Southeast Alaska exemptions and for elimination of commercial sales. The rejection of Proposal WP06-01 was published in the Federal Register on June 30, 2006 (71 Fed. Reg. 37642).

The enclosed Request for Reconsideration of Proposal WP06-01 details the reasons for our opposition to the Federal Board action to retain the existing regulation.

I urge the Federal Subsistence Board to carefully consider this request and to act expeditiously given the serious implications for the resource.

Sincerely,



McKie Campbell  
Commissioner

Enclosure

cc: Wayne Regelin, Deputy Commissioner, Alaska Department of Fish and Game  
David Bedford, Deputy Commissioner, Alaska Department of Fish and Game  
Alaska Board of Game members

**REQUEST FOR RECONSIDERATION  
OF FEDERAL SUBSISTENCE BOARD PROPOSAL WP06-01  
By State of Alaska  
August 25, 2006**

**I. Introduction.**

The State of Alaska, through the Alaska Department of Fish and Game (ADF&G), respectfully requests that the Federal Subsistence Board (Board) reconsider its decision of May 16, 2006, on Proposal WP06-01. The Board rejected the proposal to adopt rules relating to commercial sales of claws and other parts of bears taken for subsistence, thereby leaving such sales unconstrained. The Board rejected suggestions from ADF&G and others for removal of Southeast Alaska exemptions and for elimination of commercial sales. The rejection of Proposal WP06-01 was published in the Federal Register on June 30, 2006 (71 Fed. Reg. 37642).

Reconsideration is required because the Board's refusal to amend the existing rule allows unrestrained sales of bear parts to continue, ignoring the fact that in development of the existing rule, "existing information used by the Board [was] incorrect" and that "the Board's interpretation of information, applicable law, or regulation [was] in error or contrary to existing law." 36 CFR § 242.20(d); 50 CFR § 100.20(d); see also Attachments 1 and 2 (ADF&G Requests for Reconsideration on Proposals WP04-01 and WP05-01, hereby incorporated by reference). Allowing the existing rule to remain in place without modification repeats and further perpetuates these errors.

The Board's action to continue to allow the unconstrained sale of bear claws and other parts under current regulations is inconsistent with the Alaska National Interest Lands Conservation Act (ANILCA) because (1) such sales are inconsistent with sound wildlife management principles; (2) the decision is based on incorrect information; (3) the decision continues to authorize a use that has not been demonstrated to be customary and traditional as a "subsistence use;" (4) the decision effectively allows "significant commercial enterprises;" and (5) to the extent that it is interpreted to allow purchase of claws, teeth, bones, and skulls by persons who are not rural Alaska residents, it exceeds the jurisdiction of the Board.

In addition, the regulations allowing the unconstrained sale of grizzly bear claws, teeth, skulls, and bones were also adopted in violation of 16 U.S.C. § 1536(a) (Endangered Species Act: Interagency Cooperation) because the Board, despite concerns raised relating to impacts on endangered and threatened species outside Alaska, failed to consult with the secretary to insure that its action "is not likely to jeopardize the continued existence of any endangered species or threatened species." The Board's failure to adopt regulations constraining such sales perpetuates this violation.

In summary, the Board's action to allow the regulations to remain in effect without constraining commercial sales is arbitrary and capricious and in violation of the law because: (1) the current regulations undermine state, national, and international wildlife protection and enforcement efforts; (2) the Board action was based on incomplete and inaccurate information; (3) the current regulations authorize unconstrained sales as a customary and traditional activity without any substantial evidence in the record showing that such sales have ever occurred; (4) the current regulations will allow commercial sale of bear parts, including internet based sales; (5) the current regulations have been interpreted to allow purchase of claws, teeth, skulls and bones by non-federally qualified subsistence users, despite the fact that such purchase is prohibited under state law; and (6) the current regulations were adopted in violation of the requirements of the Endangered Species Act. In light of these deficiencies and the other significant deficiencies noted above, the Board's action in allowing the regulations to remain in place, without constraining commercial sales, is arbitrary and capricious and contrary to statute.

The failure to adopt regulations constraining commercial sales perpetuates the problems caused by the Boards actions on Proposal WP05-01, for which the state filed a timely request for reconsideration on August 18, 2005, rejected by the Board on January 17, 2006, as well as problems caused by the Boards actions on WP04-01, for which the State of Alaska submitted a timely request for reconsideration, rejected by the Board on November 1, 2004.

As required by 36 CFR § 242.20(d)(4) and 50 CFR § 100.20(d)(4), a detailed statement follows.

## **II. Regulations Challenged.**

At its meeting in May 2006, the Board considered Proposal WP06-01, which as proposed, would have amended 36 CFR § 242.25 and 50 CFR § 100.25 as follows (additions in bold):

**§\_\_\_.25(j)8(a) You may not sell handicrafts made from the claws of a black or brown bear to an entity operating as a business as defined in Alaska Statute 43.70.110(1), unless the bear was taken in Units 1-5.**

**§\_\_\_.25(j)8(b) If you are a business as defined under Alaska Statute 43.70.110(1) you may not purchase handicrafts made from the claws of a black or brown bear as part of your business transactions, unless the bear was taken in Units 1-5.**

**§\_\_\_.25(j)8(c) The sale of handicrafts made from the nonedible byproducts of brown and black bears, when authorized in this part, may not constitute a significant commercial enterprise.**

During the May 2006 meeting, the Board, by a 5-2 vote, rejected the proposal in its entirety. The Board ignored State suggestions for modification of the proposal to eliminate regional differences and limit any sales of bear parts to sales to other federally qualified subsistence users. The Board also ignored the recommendation of the Kodiak/Aleutians Regional Advisory Council, which urged the Board to completely eliminate sales of bear claw handicrafts. The effect of the rejection of any regulatory amendment limiting sales of bear parts is to retain existing unenforceable regulations, which do not effectively constrain commercial sales.<sup>1</sup> These unenforceable regulations provide:

(6) If you are a Federally-qualified subsistence user, you may sell handicraft articles made from the skin, hide, pelt, or fur, including claws of a black bear.

(i) In Units 1, 2, 3, 4, and 5, you may sell handicraft articles made from the skin, hide, pelt, fur, claws, bones, teeth, sinew, or skulls of a black bear taken from Units 1, 2, 3, or 5.

(ii) [Reserved].

(7) If you are a Federally-qualified subsistence user, you may sell handicraft articles made from the skin, hide, pelt, or fur, including claws of a brown bear taken from Units 1–5, 9A–C, 9E, 12, 17, 20, or 25.

(i) In Units 1, 2, 3, 4, and 5, you may sell handicraft articles made from the skin, hide, pelt, fur, claws, bones, teeth, sinew, or skulls of a brown bear taken from Units 1, 4, or 5.

(ii) [Reserved].

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<sup>1</sup> The Board did take action on WP06-02, which included a blanket statement indicating that the sale of handicrafts “may not constitute a significant commercial enterprise.” However, this statement merely mirrors prior court determinations regarding the scope of enterprises permitted under ANILCA and is virtually unenforceable because “significant commercial enterprise” is not defined, making a fact specific finding necessary in each case as to whether a sale or pattern of sales constitutes a “significant commercial enterprise.” *See United States v. Alexander*, 938 F.2d 942, 948 (9th Cir. 1991). *See also* Transcript at 40 (statement presenting Interagency Staff comments, indicating that simple prohibition on significant commercial enterprises would be inadequate due to the “difficulty of enforcing terminology that is undefined, leaving it up to the courts to determine what constitutes a significant commercial enterprise,”) 45 (statement by Board member Edwards indicating that the U.S. Attorney’s office has indicated that it will not pursue cases based on the undefined term “significant commercial enterprise,”) 46-47 (statement of Forest Service Special Agent Myers indicating that any emerging problems would probably be ignored due to enforceability problems caused by the lack of definition).

71 Fed. Reg. 37658.

The regulations fail to impose any enforceable limits on the amount of money that may be exchanged for the handicraft items and contain no enforcement or tracking mechanisms to ensure that sales are limited to parts of bears that have been legally taken in a federal subsistence hunt in a designated area. According to a question and answer informational sheet prepared by federal staff and approved by the Board in July 2005 (Attachment 3), although sale and resale is limited to federally qualified rural residents, the Federal Subsistence Board interprets the regulations to allow anyone to purchase bear claw handicrafts (despite state statutes and regulations that generally prohibit purchase). At the Board meeting on May 16, 2006, during deliberations, it was pointed out that there is nothing in the regulations prohibiting sales over the internet through sites such as eBay. (Transcript at 49-50).

**III. Discussion: The current regulations are contrary to law and should have been amended.**

Reconsideration by the Board is required because in retaining the current regulations, which are arbitrary and capricious and inconsistent with federal law, *see* ADF&G's Requests for Reconsideration on WP04-01, (Attachment 1) and WP05-01 (Attachment 2), the Board acted arbitrarily and capriciously and in excess of its statutory authority.

**A. The Board's actions and regulations are inconsistent with "sound management principles, and the conservation of healthy populations of fish and wildlife."**

The Board's actions on WP06-01 fail to address the problems caused by the Board's actions on WP04-01 and WP05-01 and are inconsistent with sound management principles for the same reasons raised in ADF&G's Requests for Reconsideration on WP04-01, (Attachment 1) and WP05-01 (Attachment 2), as well as for the reasons set forth herein. The Board has created and is perpetuating a new market for bear claws, skulls, and bones that will mask illegal sales, thereby compounding problems with the international trade of Endangered Species and contributing to the illegal harvest, overharvest, and waste of bears in Alaska and in other states and countries. The Board's actions on WP06-01 failed to restrict sales to customary and traditional use, failed to restrict sales to businesses, failed to effectively prohibit sales amounting to significant commercial enterprises, failed to eliminate unenforceable regional differences, and failed to implement any kind of a tracking mechanism to make the regulations enforceable. The regulations should be reconsidered and amended to prohibit the sale of handicraft items

made from bear claws, teeth, and skulls or allow only limited sales to other federally qualified subsistence users for customary and traditional uses.

In adopting the subsistence priority in ANILCA, Congress carefully enunciated its policy to make it clear that the subsistence priority would be subject to sound management and conservation principles as follows:

It is hereby declared to be the policy of Congress that –

(1) consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, ... consistent with management of fish and wildlife in accordance with recognized scientific principles ... the purpose of this subchapter is to provide the opportunity for rural residents engaged in a subsistence way of life to do so....

16 U.S.C. § 3112(1).

Both North American brown and black bears are listed in Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), a global treaty aimed at control of trade in endangered and threatened species. 2005 Materials at 214. In addition, the brown bear populations in the 48 conterminous states are listed as threatened under the Endangered Species Act and populations in Mexico are listed as endangered. *See* 50 CFR 17.11.

As indicated in the state's comments and in comments by state and federal enforcement officers in the discussions on WP05-01 in 2005,<sup>2</sup> regulations allowing unlimited and untracked sales of bear claws, teeth, bones, and skulls violate sound management principles. Concerns regarding brown bear populations within Alaska, as well as general concerns about conservation of bears nationally and internationally, were raised in 2005, and these general concerns were repeated in reference to WP06-01.

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<sup>2</sup> *See, e.g.,* ADF&G Comments on 2005-06 Federal Subsistence Wildlife Proposals For Presentation at the Federal Subsistence Board Meeting, May 3-4, 2005 at 1 (“ADF&G 2005 Written Comments”) (“Extending well beyond Alaska to national and international contexts, the sale of bear claws and other parts has generated a market enticing those who are far removed from subsistence traditions.”); Alaska Department of Public Safety comments Wildlife Meeting Materials May 3-4, 2005 at 211 (“We believe that allowing the sale of bear parts will increase illegal take and waste of bears, will exasperate the black market issues, . . .”); 2005 Wildlife Transcript at 203 (Federal Special Agent commenting “The trend toward creating region-specific regulations concerning wildlife utilization on the other hand makes enforcement nearly impossible.”)

Federal Interagency Staff comments on proposal WP06-01 advised the Board, that failure to modify the proposal would perpetuate enforcement problems because enforcement officers “would be unable to differentiate between these legitimate commercial sales that would be legitimized by passing this regulation, and sales of products from poached bears or bears harvested under State regulations or bears harvested under the Federal regulations from the Eastern Interior and Bristol Bay regions.” Transcript at 27.

Enforcement concerns were also voiced by four of the Board’s Regional Advisory Councils: the North Slope Regional Advisory Council, the Northwest Arctic Regional Advisory Council, the Western Interior Regional Advisory Council, and the Kodiak/Aleutians Regional Advisory Council. See, e.g., Meeting Materials at 9-11; Transcript at 34. These Regional Advisory Councils recognized the enforcement problems caused by regional exceptions. The Kodiak/Aleutians Regional Advisory Council urged the Board to completely eliminate sales and only allow trade, barter and sharing, explaining the potential for abuse and the lack of ability to track sales, and admonished the Board that “the resource is too valuable to subject to potential problems involved with sales.” Meeting Materials at 11.

Defenders of Wildlife raised the same enforcement concern in its written public comments pointing out that exceptions to prohibitions on sales of bear parts for portions of the State “raise serious monitoring and enforcement problems for State and Federal agencies.” Defenders further elaborated regarding the commercial incentive for sale of claws noting “the relative ease of procurement, handling, and transfer of these desired items in the broad commercial market.” Meeting Materials at 18.

During Board discussions on WP06-01, ADF&G also reiterated its concerns regarding enforceability, the importance of eliminating regional exceptions, and the need to limit sales among federally qualified subsistence users. Transcript at 41. ADF&G pointed out that under the existing regulations “there’s a high risk of illegal – people doing illegal poaching just to sell bear claws and they can do it on the internet, they can do it anywhere in the state and we’re not going to be able to regulate it.” Transcript at 50.

The Board’s decision to continue to apply different regulations regarding sale of bear parts from different regions and to allow bear part sales to be virtually unlimited, subject only to the unenforceable restriction against undefined “significant commercial enterprises” that applies to all handicrafts, is not consistent with sound wildlife management principles. The Board’s decision completely fails to consider enforceability and impacts on illegal practices either within Alaska or on the global trade in endangered

and threatened species.<sup>3</sup> The Board's action continues to focus entirely on effects of legal harvest and use in the area where such use is authorized,<sup>4</sup> demonstrating that the Board fails to recognize the basic fact, that if there is a legal market for a wildlife part with a high value in illegal markets, the legal market will be used to mask illegal harvest and sale, and illegal harvest and sales can be expected to far exceed legal harvest and sale. It also demonstrates that Board fails to recognize that proactive consideration of impacts of regulatory authorizations on enforcement and deterrence are needed in the wildlife trade arena--once items legally sold are in circulation and markets have been created, masking of illegal trade is possible--even if future actions restrict further sales. Federal staff presented reports documenting some of these concerns to the regional advisory councils in 2004:

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<sup>3</sup> These issues were raised by the BLM representative, Mr. Brelsford in 2004 in reference to Proposal WP04-01:

I heard it suggested that law enforcement is not a legitimate consideration in this. And again, I would have to say I think our reasoning process does in fact have to take into account the law enforcement context. In my view, that represents one component of the quote, "recognized principles of fish and wildlife conservation."

So in my mind, the issue before the Board is really a balancing act. There are historic episodes of market driven overharvest through the commercialization of subsistence resources. The market hunting in the Nenana area and the impact the role that played in the establishment of Denali National Park would be one example. There are international examples where key subsistence resources were commercialized without meaningful regulatory regimes, and those resources were driven into extirpation in some cases. So I think we ought to put all of the elements on the table and think about the balancing act. We want to provide for the legitimate subsistence uses in regions, and we want to listen and learn from councils about what those uses are. At the same time, I think we do want to take into account what law enforcement tells us about market pressures and so on.

FSB Transcript at 261-62. However, at its 2005 meeting, the Board and staff failed to address issues regarding illegal take, instead stating repeatedly that the Board regulation applied only to legal take where the bear had to be eaten. Materials at 219-20; Transcript at 149, 152, 163, 184.

<sup>4</sup> See, e.g., Transcript at 46 (Board question to Forest Service enforcement focusing on whether there has been a problem in Southeast Alaska).



A regulatory law enforcement framework to control illegal harvest or to control the legal sale of brown bear fur handicraft items is not currently in place, nor does it appear to be practical. This proposal generates many legal, biological, and cultural concerns. Should the board adopt this proposal, some rural residents will find this practice culturally objectionable. **The sale of handicraft items made from brown bear parts could increase the potential for additional legal and illegal harvest, possibly over-exploiting some populations. The development of a cash economy associated with the sale of wildlife products has often been shown to be detrimental to the species involved. Brown bear populations are usually small in number, have low population growth rates, low sustainable yields, higher commercial value, and are easily over-harvested.** Adopting this proposal may result in increased illegal harvests and provide economic incentives that may lead to the wasting of some bear parts, such as the meat. Individuals not previously associated with bear hunting could change their behavior and become bear hunters. **Commercial trade in brown bear fur handicrafts could lead to an increase in illegal trafficking of endangered populations of brown bear outside of Alaska.**

*See, e.g., Wildlife Meeting Materials for March 18, 2004, Meeting of the Kodiak/Aleutians Regional Advisory Council at page 26 (emphasis added).* Nothing has changed since this time.

At a Board meeting on May 20, 2004, the Interagency Staff Committee stated:

The Federal threatened status of brown and grizzly bears in the Lower 48 States will require permits for the sale of brown bear parts, such as handicrafts, that would be taken outside of the borders of Alaska, and such a permitting process is not in place. **Accordingly, there is no enforcement framework to limit the trade in brown bear handicrafts to those taken solely in Alaska, and permitting such trade without the proper permitting process would be contrary to wildlife conservation principles.**

Federal Subsistence Board May 20-21, 2004, FSB 2004 Meeting Transcript at 249 (“FSB 2004 Transcript”)(emphasis added). No new information was presented at the 2005 meeting or the May 2006 meeting to indicate that this concern had been addressed.

As indicated in the state’s previous Requests for Reconsideration on Proposal WP04-01 and WP05-01, there is strong indication that bears have been and will be taken

for their claws alone and that this taking will not be restricted to areas where sales are authorized under the federal regulations. An August 4, 2004, article in the *Anchorage Daily News* reported that front claws had been cut from at least two brown bear carcasses that had been left to rot along the northern border of the Katmai National Park and Preserve. (Attachment 4 at 1) Katmai Superintendent Joe Fowler indicated that there had been no attempt to harvest other body parts of the bears. *Id.* The Board and federal staff did not even mention this problem at the May 2006 meeting, and in fact federal enforcement provided misleading information, focusing on Southeast Alaska and indicating that there had been no observed problems. Transcript at 46. At the May 2006 meeting, federal staff also failed to even mention previous poaching problems that have occurred inside and outside Alaska as the result of illegal trade in bear gallbladders, nevertheless to explain how a legal market in other high value bear parts could be expected to occur without creating similar problems. Board member Edwards attempted to raise this issue, but instead of discussing the concerns, the Board proceeded to a vote. Transcript at 50-51.

As shown above, the Board's regulations allowing unconstrained trade in bear parts in general, and particularly brown bear claws, is not consistent with sound wildlife management principles, thus the Board's decision to reject regulatory action constraining commercial sales must be reconsidered.

**B. The current regulations, and the Board's rejection of restrictions on commercial sales, are inconsistent with ANILCA and are arbitrary because they are based on incorrect information.**

Reconsideration is required because the Board's determination that it is acceptable to continue authorizing unrestrained sales was based on the Board's continued misperception that there is no conservation issue.<sup>5</sup> This determination in turn rests on incorrect information supplied to the Board indicating that the Board's previous regulatory action had not contributed to enforcement problems with waste of bears.

During the 2005 meeting, Federal staff indicated that no problems resulting from the regulations allowing sale of bear parts had been reported. *See, e.g.*, 2005 Transcript at 150, 215. This statement was incorrect, incidents involving the killing of bears for their paws near Katmai National Park were reported and had previously been cited by ADF&G in Requests for Reconsideration on proposals WP04-01 and WP05-01. *See* Attachment 4 at 1; Attachment 3 at 15. This error was not corrected during the 2006 meeting, and a federal enforcement officer did not volunteer the information when questioned about whether there had been any problem with sales turning into commercial

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<sup>5</sup> *See*, ADF&G Request For Reconsideration on WP05-01 at 14-15 (August 18, 2005)(Attachment 2); *see also* 71 FR 37643.

enterprises. *See* Transcript at 46-47. Chairman Demientiff incorrectly stated that “enforcement has already said there is not a problem,” Transcript at 49, and then commented “I’m confident our enforcement people can do their job.” The remarks overlook numerous comments on the record from staff, Transcript at 27, and enforcement, Transcript at 46, regarding the unenforceability of the regulations, and statements by enforcement indicating that because of the lack of definition, any problems starting up “would probably be ignored.” Transcript at 47. Because the Board was given incomplete and inaccurate information resulting in a misperception that there were no conservation issues, the decision based on use of this incorrect information requires reconsideration by the Board.

**C. The current regulations are inconsistent with ANILCA because they authorize transactions that are not customary or traditional.**

Reconsideration is required because in adopting the current bear claw regulations, the Board did not adhere to provisions of Section 803 of ANILCA, which authorizes only subsistence uses that are customary and traditional. The Board did not have substantial evidence before it, that the sales, as opposed to the barter, sharing or use of bear claws in handicraft items, was customary and traditional or a customary trade practice. Further, even if the Board were to find that barter had been replaced by sale, the record would still only support limited noncommercial sales (e.g., between members of opposite clans in Southeast Alaska). The record does not support unconstrained commercial sale as a customary and traditional use, and it does not support sales by all rural residents.<sup>6</sup> The State raised lack of substantial evidence again with respect to WP06-01, noting that unrestrained sales were not necessary in order to provide for use for religious and ceremonial purposes. Transcript at 50. The Board declined the opportunity to correct its previous error in authorizing commercial sale, a use that is not customary and traditional.

Federal courts have already acknowledged that ANILCA only authorizes “customary and traditional” subsistence uses on federal public lands in Alaska. The Ninth Circuit Court of Appeals has previously identified criteria for addressing the scope of customary trade authorized by ANILCA to be a valid subsistence use under ANILCA customary trade:

1. must be “customary and traditional;”
2. “must be conducted in a manner consistent with a subsistence lifestyle; ANILCA does not permit the establishment of significant commercial enterprises under the guise of subsistence uses;” and

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<sup>6</sup> *See*, ADF&G Request For Reconsideration on WP05-01 at 15-20 (August 18, 2005)(Attachment 2).

3. where some sale is customary and traditional, “the size of the transaction or the manner in which it is conducted may place it outside the bounds of customary trade.”

*United States v. Alexander*, 938 F.2d 942, 948 (9th Cir. 1991). Under ANILCA and this judicial interpretation, only uses and transactions that are customary and traditional, consistent with a subsistence lifestyle, and within the bounds of customary levels are authorized by ANILCA.

There is not only no substantial evidence in the record of this meeting or the Board’s previous rulemakings to show that the sales allowed by the current rules are consistent with customary practice, but in fact the record illustrates that such sales are not customary and traditional and that only limited trade and barter for religious and ceremonial purposes has historically occurred. Nothing in the record of the 2006 meeting supported unconstrained sales as a customary and traditional practice. The regulations relating to uncontrolled sale of handicrafts by any rural resident made with bear claws, teeth, skulls, and bones, are inconsistent with ANILCA because they authorize uses that were not customary and traditional. By rejecting WP06-01 and not using the opportunity to correct its previous error, the Board acted arbitrarily and capriciously perpetuating actions taken in excess of the statutory authority of ANILCA. Reconsideration is therefore required.

#### **D. The current regulations allow commercial use of bear claws.**

ANILCA does not authorize subsistence uses that are significant commercial enterprises. *United States v. Alexander*, 938 F.2d 942, 948 (9th Cir. 1991). The final rules, even with the Board’s action on WP06-02, generally authorize transactions of any size, with no real limits on the dollar values involved. Because there is no definition of “significant commercial enterprise,” the regulations impose no real limitation. The Board was presented with information in 2005 from the state indicating that the claws from a single brown bear could sell for about \$1,500. 2005 Transcript at 178. In 2005, Mr. Littlefield, then Chair of the Southeast Regional Council, indicated that some individuals would pay as much as \$3,000 for a bear claw. 2005 Transcript at 156. During the 2006 deliberations, it was pointed out that internet and eBay sales are permissible under the regulations. Thus, the current regulations create a commercial market for bear claws. Because of this commercial market, it is likely that in addition to increased levels of legitimate subsistence hunting, illegal hunting and illegal use of bears taken in other hunts will also increase, creating an entirely “commercial” market. Both federal and state authorities have indicated that a generalized restriction against “significant commercial enterprises” is not enforceable. *See, e.g.*, Transcript at 46-47, 50. Reconsideration is

therefore required to restrict sales or at least define “significant commercial enterprise” to make the current regulations enforceable.

**E. The current regulations exceed the jurisdiction of the Board.**

By failing to adopt limitations on commercial sales to exclude sales to nonrural residents, the Board exceeded its jurisdiction. State statutes and regulations of general applicability prohibit the sale of bear claws. State statutes provide:

(a) Unless permitted by AS 16.05 - AS 16.40, by AS 41.14, or by regulation adopted under AS 16.05 - AS 16.40 or AS 41.14, a person may not take, possess, transport, sell, offer to sell, purchase, or offer to purchase fish, game, or marine aquatic plants, or any part of fish, game, or aquatic plants, or a nest or egg of fish or game.

AS 16.05.920(a). State regulations generally provide:

(b) Except as provided in 5 AAC 92.031,<sup>7</sup> a person may not purchase, sell, barter, advertise, or otherwise offer for sale or barter:  
(1) any part of a bear, except an article of handicraft<sup>8</sup> made from the fur of a bear;

5 AAC 92.200 (footnotes added).

The only exception under state law is for sales of untanned skins with claws attached under a permit issued by the department for bears in certain active predator control units. *See* 5 AAC 92.031(c) & (d). These limited sales require permits and sealing of skull and skin and with a metal locking tag, *id.*, and are trackable in commerce. *See* Transcript at 42. Sales of detached claws are not permitted; resale is very limited and subject to permit requirements under 5 AAC 92.031. Under state law, claws cannot legally be removed and sold either before or after the initial sale; removal of the claws after taking the sealed skin from the state remains a violation of state law and is also a federal violation of the Lacey Act (*see* 16 U.S.C. 3372); thus the state law does not create a legal market for claws.

The Federal Subsistence Board, pursuant to the decisions of the federal courts, may adopt regulations under ANILCA providing for customary and traditional

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<sup>7</sup> 5 AAC 92.031 provides narrow exceptions relating to sales, by permit, by licensed taxidermists, estate executors, and bankruptcy referees.

<sup>8</sup> “Fur” as opposed to “skin” under state regulation does not include claws. *See* 5 AAC 92.990.

subsistence uses by rural Alaska residents. However, nothing in ANILCA or the court decisions interpreting ANILCA authorizes the Board to adopt regulations that exempt persons who are not Alaska rural residents from the application of state laws of general applicability. Nonetheless, the Federal Subsistence Management Program issued a question and answer sheet, approved by the Board in July of 2005, *see* Transcript at 26, indicating that “it is the opinion of the Federal Subsistence Board that sales authorized in Federal subsistence regulations allow purchase by anyone.” Attachment 3 at 2. Further, at the May 2006 meeting, Board member Edwards responded to a question indicating he interpreted the current regulations to allow sales worldwide via the internet and eBay. Transcript at 49-50; none of the other Board members or staff asserted any problem with this interpretation. Reconsideration is therefore required, because by purporting to authorize individuals who are not Alaska rural residents to violate state laws of general applicability, the Federal Subsistence Board exceeded its authority, and it perpetuated this error by declining to impose limitations on commercial sales.

**F. The current regulations violate section 7(a)(1) and 7(a)(2) of the Endangered Species Act and the Boards rejection of WP06-01 perpetuates violation.**

Reconsideration is required because the regulations authorizing sale of grizzly bear claws, teeth, skulls, and bones without restrictions to prevent commercial sales were adopted in violation of the requirements of section 7(a)(1) and 7(a)(2) of the Endangered Species Act.<sup>9</sup> The current regulations are likely to result in increased poaching of endangered and threatened bears in the continental United States and Mexico; action to adopt a modified WP06-01 could have greatly reduced the commercial incentives for poaching outside Alaska and would have eliminated criminal defense arguments raised by the Board’s regulations, making enforcement against poachers outside Alaska much easier by eliminating the opportunity to mask illegal sales as legal sales. As discussed at the 2006 meeting, sales of bear handicrafts can occur over the internet, Transcript at 49-50, thus sales can occur throughout the United States and the world. The Board’s previous determination in response to the State’s Request for Reconsideration on WP05-01, that any impacts on threatened and endangered species are speculative, was mistaken and was based at least in part on a threshold analysis that mistakenly assumed the relevant “action area” for analysis is limited to Alaska.<sup>10</sup> It is certain that the Board’s regulations make enforcement actions against individuals possessing bear claws, teeth, and skulls from endangered or threatened bears outside Alaska more difficult, and considering market forces, it is also reasonably certain that the Board’s regulations will cause private parties to illegally take threatened and endangered bears.

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<sup>9</sup> *See*, ADF&G 2005 RFR WP05-01 (Attachment 3).

<sup>10</sup> *See*, Threshold Analysis Request for Reconsideration WRFR05-01 at 9 (December 16, 2005).

Therefore, reconsideration of WP06-01 is required to allow the Board to remove both the barriers to successful prosecution and the market incentives for poaching of threatened and endangered species that it has created. Upon reconsideration, either the regulations must be revised so that the Board may reasonably determine that they will not reach the level where they may “affect” listed species, or the Board must complete consultation under section 7 of the Endangered Species Act.

**G. The current regulations and the Board’s failure to amend the regulations are arbitrary and capricious.**

The Board’s action in rejecting WP06-01, instead of amending it, restrain commercial sales, is arbitrary and capricious because the current regulations are arbitrary and capricious and the Board could have easily solved this problem through amendment of WP06-01. In order to be valid, regulations must be reasonable and not arbitrary or capricious. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 91 S.Ct. 814, 822 (U.S. 1971). The object of the current rules is purportedly to provide for customary and traditional subsistence uses, but the record does not demonstrate any substantial evidence that the sales allowed under the regulations are customary or traditional.<sup>11</sup> Further, the current regulations are inconsistent with sound wildlife management principals, are based upon incorrect information, allow commercial sales, and are interpreted by the Board to authorize violations of state law by individuals who are not rural Alaska residents. The regulations, in the absence of an amendment which could have been made through acting on WP06-01, “may affect” species listed under the Endangered Species Act, and were adopted without undergoing consultation required under section 7 of the Endangered Species Act. These logical defects render both the current rules and the Board’s failure to amend the rules arbitrary and capricious. Accordingly, the Board should reconsider its decision to and take action to eliminate or effectively constrain commercial sales.

**IV. Conclusion.**

The current regulations relating to sale of bear handicrafts are not based on sound management principles. The regulations ignore significant management and enforcement concerns of the state and federal enforcement officers. The regulations authorize uses that are not customary and traditional and have the potential to develop into significant commercial enterprises. The regulations are based on incorrect information, and as interpreted by the Board, exceed the Board’s authority. The regulations were adopted in violation of the requirements of section 7 of the Endangered Species Act. The actions taken by the Board resulting in retention of the current regulations and rejecting the

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<sup>11</sup> See ADF&G RFRs on WP04-01 and WP05-01 (Attachments 2, and 3).

opportunity to modify the regulations through action on WP06-01 are arbitrary and capricious. All of these problems could have been addressed through reasonable amendment and adoption of a modified WP06-01. For these reasons, the State of Alaska respectfully requests that the Federal Subsistence Board reconsider its final rules rejecting WP06-01 and take action to eliminate or effectively constrain the commercial sale of bear handicraft items.

STATE OF ALASKA  
DEPARTMENT OF FISH AND GAME



DATED: August 25, 2006 \_\_\_\_\_

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MCKIE CAMPBELL, COMMISSIONER